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**RESPONDENT'S CROSS-EXCEPTIONS TO THE DECISION OF
ADMINISTRATIVE LAW JUDGE LAUREN ESPOSITO**

Pursuant to Section 102.46 of the National Labor Relations Board Rules and Regulations, Respondent hereby submits its Cross-Exceptions to the Decision of Administrative Law Judge Lauren Esposito on the following points:

1. Respondent excepts to the judge's finding that Respondent violated Section 8(a)(1) by issuing Jeanine Connelly a written warning. (ALJD 22, lines 20-22).

2. Respondent excepts to the judge's finding that the Atlantic Steel factors are sufficient to analyze the situation underlying Connelly's written warning. (ALJD 19, lines 17-52; 20, lines 1-5).

3. Respondent excepts to the judge's conclusion that the Atlantic Steel factors favor a finding that Connelly's activities remained protected by the National Labor Relations Act (the "Act"). (ALJD 22, lines 17-22).

4. Respondent excepts to the judge's characterization of Connelly's verbal assault of Michael Burke on March 31, 2011 as a "discussion." (ALJD 9, lines 33-41; 10, lines 1-2).

5. Respondent excepts to the judge's finding that Connelly's verbal assault of Burke lasted about three to four minutes. (ALJD 9, lines 41-42; 10, lines 4-15).

6. Respondent excepts to the judge's finding that the suite of offices where Connelly verbally assaulted Burke is not a patient care area. (ALJD 9, line 48; 21, lines 5-6).

7. Respondent excepts to the judge's finding that while Connelly was verbally assaulting Burke, someone "may" have closed a door of the physician's office located next to Burke's office. (ALJD 10, lines 1-2; 21, lines 12-13).

8. Respondent excepts to the judge's failure to consider that Connelly was not provoked into verbally assaulting Burke. (ALJD 21, lines 1-46).

9. Respondent excepts to the judge's failure to consider that Connelly's reference to Burke as "trouble" was purely personal. (ALJD 9, lines 29-30; 10, lines 9-10; 21, lines 1-46).

10. Respondent excepts to the judge's failure to consider that Connelly continued to verbally assault Burke despite his attempts to calm her down. (ALJD 9, lines 26-30; 10, lines 9-13; 21, lines 1-46).

11. Respondent excepts to the judge's failure to consider that Connelly verbally assaulted Burke during work time and in a work area. (ALJD 10, lines 4-15; 21, lines 1-46).

12. Respondent excepts to the judge's failure to consider that Connelly continued to attack Burke personally, not one or more of Respondent's employment policies, during working time, and in front of other employees after she was pulled away from Burke's office. (ALJD 10, lines 4-15; 21, lines 1-46).

13. Respondent excepts to the judge's conclusion that there is no evidence that Connelly's verbal assault of Burke negatively impacted Burke's supervisory authority. (ALJD 21, lines 20-22).

14. Respondent excepts to the judge's failure to consider its right to maintain order and civility in the workplace. (ALJD 21, lines 1-46).

The grounds for Respondent's Cross-Exceptions are more fully set forth in its accompanying supporting brief.

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CERTIFICATE OF SERVICE

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Pursuant to Section 102.46 of the National Labor Relations Board (the “Board”) Rules and Regulations, Gaylord Hospital (the “Respondent”) files the following Brief in Support of its Cross-Exceptions to the Decision of Administrative Law Judge Lauren Esposito.

I. STATEMENT OF THE CASE

On or about June 9, 2011 and August 15, 2011, Jeanine Connelly, formerly one of Respondent’s respiratory therapists, filed Charges against Respondent. Thereafter, on September 30, 2011, a Consolidated Complaint and Notice of Hearing were issued alleging that Respondent committed numerous violations of the National Labor Relations Act (the “Act”). (GCX-1(k)¹).

A hearing was held before Administrative Law Judge Lauren Esposito over the course of 14 days between January of 2012 and April of 2012. On September 6, 2012, the judge found that the credible record evidence established that Respondent did not violate Section 8(a)(1) of the Act when it suspended Connelly on April 5, 2011, and subsequently discharged her on April 8, 2011 for intentionally falsifying a medical record. (ALJD 31, lines 4-9). The judge also found that because the “evidence overall does not establish that the specific statement Connelly attributes to [Walter Harper, Respondent’s Vice President of Human Resources], ‘complainers will have to go,’ was in fact made” (ALJD 33, lines 1-3), Respondent did not violate Section 8(a)(1) of the Act in that regard.

¹ References to Counsel for the Acting General Counsel’s exhibits shall be designated as (GCX-__); Respondent’s exhibits as (RX-__); the transcript pages as (Tr. __); and the Decision of the Administrative Law Judge as (ALJD __).

The judge, however, found that Respondent violated Section 8(a)(1) of the Act when it issued a written warning to Connelly for verbally assaulting her supervisor. In reaching her conclusion, the judge incorrectly determined that the Atlantic Steel² factors, which do not fully account for the circumstance at issues in this case, were applicable. Even if the Atlantic Steel factors were applicable, the judge erred in their application because she apparently misconstrued and/or failed to fully consider the credible record evidence as a whole. The record evidence established, among other things, that Respondent maintains a workplace where complaints are encouraged, employees, especially the respiratory therapists, are provided ample opportunity to discuss workplace issues, and employees are not disciplined for making such complaints; that Connelly verbally assaulted her supervisor during work time and in a work/patient care area; and that Connelly's actions were not spontaneous, reflexive or in anyway provoked by Respondent. Further, the judge failed to consider Respondent's right to maintain order and civility in the workplace.

Accordingly, Respondent respectfully files its exceptions to (1) the judge's finding that Respondent violated Section 8(a)(1) by issuing Connelly a written warning (ALJD 22, lines 20-22); (2) the judge's finding that the Atlantic Steel factors are sufficient to analyze the situation underlying Connelly's written warning (ALJD 19, lines 17-52; 20, lines 1-5); and (3) the judge's finding that the Atlantic Steel factors favor a finding that Connelly's actions remained protected by the Act (ALJD 22, lines 17-22).

It should be noted that the judge also found that Respondent violated Section 8(a)(1) of the Act when its Employment Administrator, Bryana Minor, suggested to

² 245 NLRB 814 (1979)

Connelly, her supervisor and the Director of the Respiratory Therapy Department that they not discuss Connelly's written warning over the weekend, and resume their conversation the following week. Although finding a violation, the judge recognized that Minor was simply attempting to provide the individuals involved with a respite from a difficult situation, and that her suggestion did not evince animus toward Connelly. (ALJD 31, lines 41-45 and fn. 42). Given the Board's recent decisions on similar issues, reported after the events that gave rise to the instant case, Respondent does not take exception to the judge's finding on this issue.

For the reasons set forth below, and based on the credible evidence contained in the record as a whole, Respondent respectfully requests the Board to reverse the Administrative Law Judge's finding that Respondent violated the Act when it issued Connelly's written warning.

II. RELEVANT FACTS

A. Respiratory Therapy Department Generally

Respondent's Respiratory Therapy Department (the "RT Department") holds weekly meetings (two agendas per month) generally run by the Director of the Department and attended by the respiratory therapists ("RTs"). (Tr. 1758). At these meetings, issues pertaining to the terms and conditions of the RTs' employment are openly discussed, and the expression of job-related concerns is encouraged so that Respondent can help the therapists provide better care. (Tr. 1705-1706).

No one RT is more vocal than another. (Tr. 1708-1709). According to Connelly, "when we have meetings. . . we could open up." (Tr. 280). Similarly,

William Hutson, a RT, testified that Respondent's Vice President of Clinical Services, Charlotte Hyatt, was always receptive, understanding and encouraged everyone to speak their minds. (Tr. 859). Although the RTs would not always agree with each others' opinions (Tr. 214, 1231-1232, 2209), no RT has ever been disciplined for expressing his or her opinion, whether at a meeting or otherwise. (Tr. 214, 253, 280, 849, 851, 866, 888, 971, 1105, 1127-1128, 1216, 1224-1225; GCX-43).

B. Department of Public Health Investigation and Respondent's Response to the Investigation

In the fall of 2010, an anonymous complaint was made to the Connecticut Department of Public health ("DPH"), prompting the agency to conduct an unannounced investigation of Respondent's facility. (Tr. 1410- 1412). At the conclusion of its investigation, the DPH identified several issues requiring action by Respondent, the majority of which involved the RT Department, including a department-wide pattern of missed medications. (Tr. 1413-1414; RX-5, pp. 3-5).

Upon review, Respondent found that the problem of missed medications was not isolated to one or two specific RTs, but rather was systemic within the RT Department. (Tr. 1425-1426). As a result, Respondent undertook a campaign to educate the RTs, including Connelly, in order to help them improve their practice and to reduce the number of missed medications. (RX-4; Tr. 1426). As testified to by Hyatt,

[t]here was extensive education and meetings with staff regarding, particularly, the missed medications. So that because it was general practice, we couldn't fire the entire department, we were trying to educate and improve practice.

(Tr. 1993). In addition to increased education, Respondent took steps to improve documentation practices by making “patient sleeping” and “deferred” unacceptable reasons for missing medications (RX-4), and by emphasizing the importance of filing medication occurrence reports documenting that medications were in fact missed.³ (Tr. 1768-1769).

The importance of reducing the number of missed medications was first discussed immediately following the DPH investigation at the November 17, 2010 RT meeting. (GCX-9). Thereafter, the issue was regularly discussed within the department, including at the February 16, 2011 meeting where it was reported that “[f]or January 2011 we were at 1.5 missed which brought us above goal at 98.5% . . . [k]eep up the good work”(GCX-24, ¶ 6), and at the March 28, 2011 meeting where the importance of providing either Michael Burke, the Supervisor of the RT Department, or Paul Trigilia, the Director of the RT Department, with medication occurrence reports to forward to the pharmacy was further discussed. (GCX-2). As testified to by Teresa Charland, a RT who attended the March 28, 2011 meeting, “Mike and Paul wanted to know if one of us or somebody before us missed a medication.” (Tr. 149).

Although the number of missed medications was improving due to Respondent’s initiatives, for whatever reasons, RTs were reluctant to fill out and file medication occurrence reports.⁴ (Tr., p. 1776). Thus, Respondent increased its efforts to educate the staff by having Hyatt and Susan Hostage, Respondent’s Director of Outcomes

³ The requirement that RTs file medication occurrence reports was not a new one. (GCX-40).

⁴ Medication occurrence reports are not limited to the RT Department and are required to be filled out by every other department within the hospital. (Tr. 1776-1777). In fact, the Nursing Department fills them out on a regular basis. (Tr. 1777).

Management, speak on the issue at RT Department meetings in April of 2011. (GCX-15 and 19).

C. The Written Warning

As found by the judge, “[a]lthough Connelly did not attend the March 28, 2011⁵ meeting, other RTs discussed it with her during the days that followed. According to Charland, she and Connelly, as well as Slowenski and Maher, discussed the increased emphasis on occurrence reports while working together.” (ALJD 8, lines 41-44). Thus, although Connelly did not attend the March 28 meeting, between Respondent’s efforts and her co-workers communications, the issue of medication occurrence reports, and the need to file such reports, was not new to her or any other RT on March 31.

Despite the foregoing, on March 31 after reviewing the March 28 meeting minutes, which indicated nothing more than what Respondent had spent months trying to accomplish within the RT Department (i.e., filling out medication occurrence reports and giving them to Burke or Trigilia to give to the Pharmacy (ALJD 8, lines 16-22)), Connelly took it upon herself, during work time and in a work area, to verbally assault Burke, her supervisor, for close to 20 minutes, and label him “TROUBLE” in front of other co-workers. (GCX-29). In the Decision, the judge concluded that Connelly’s verbal assault on Burke only lasted three to four minutes. (ALJD 9, lines 41-41; 10, lines 4-15). Respondent excepts to that conclusion because it is belied by the credible record evidence. (GCX-29).

⁵ All dates hereinafter are 2011, unless otherwise indicated.

Although Connelly testified that she never referred to Burke as “trouble,”⁶ unquestionably, the best and most contemporaneous evidence of what occurred on March 31 is contained within Burke’s e-mail drafted while Connelly was still “bad mouthing” him. (GCX-29). In fact, the only credible evidence presented at the hearing on this issue originated with Burke. Thus, to the extent the judge’s finding that Connelly’s verbal assault on Burke was merely a “discussion” (ALJD 9, lines 33-41) is based on Connelly’s testimony, Respondent excepts to that finding as it is not supported by the record evidence as a whole and was only testified to by a wholly incredible witness.⁷

According to Burke, who was Counsel for the Acting General Counsel’s own witness,

at 720 this morning [Connelly] came to my door at my office questioning some of the minutes from Mondays minutes. In discussing about miss tx’s and writing occurrence reports. She disagreed with writing these on fellow therapists which is fine she is allowed her thoughts. The[n] she started to get verbally abusive with me screaming at me that I am TROUBLE by making people do this. I tried to explain that it came from upper management and she continued to get loud with me. Helena heard it from the staff documentation room and came in and grabbed [Connelly] to pull her away. Consider this a write up I will not tolerate this attitude and she is continually walking around here bad mouthing myself as I write this.

(GCX-29).

Consistent with his March 31 e-mail and his sworn affidavit given to the Board on July 20 (RX-3), on direct examination by opposing counsel, Burke testified that he tried to explain to Connelly that medication occurrence reports were not about writing people

⁶ The judge rejected this position even though it was also pressed by Counsel for the Acting General Counsel (hereinafter “opposing counsel”) in its brief to the judge. (ALJD 20, fn. 29).

⁷ According to the judge, Connelly “exhibit[ed] a propensity for exaggeration, and for making assertions of fact regarding matters of which she knew little.” (ALJD 16, lines 39-41). In addition, the judge found that Connelly was “argumentative and unresponsive on cross examination, and had to be directed by [the judge] to answer the questions posed to her on more than one occasion.” (ALJD 17, lines 20-22).

up, but she would not listen to him and continued to call him “trouble.”⁸ (Tr. 1128-1129). Burke testified that the more he tried to calm her down, the more heated she became, forcing him to raise his voice so that she could hear him. (Id.). According to Burke, it was “[o]ne big altercation.” (Tr. 1129). In that regard, the record is clear that Connelly verbally assaulted Burke without provocation. It was Connelly who apparently had an issue with the medication occurrence reports,⁹ and Burke would have no reason to be upset about them. In fact, Burke was at the March 28 meeting and testified that “everybody . . . was very clear that what we were talking about [was] medication occurrence reports.” (Tr. 1238).

When asked to explain specific portions of his March 31 e-mail, Burke testified that “verbally abusive” meant that Connelly was getting “extremely loud, and going on calling me trouble.” (Tr. 1138). With respect to the word “TROUBLE,” Burke testified that it was written in all capital letters because Connelly was “right to the point with that word . . . [a]nd loud.” (Tr. 1247). Burke testified that Helena Egolum, another respiratory therapist, escorted Connelly away from Burke’s office because “[Connelly] was loud.” (Tr. 1253-1254). Burke also testified that even after Egolum pulled Connelly away, Connelly remained in the alcove outside of Burke’s office (RX-23) “ranting” that Burke was “trouble.” (Tr. 1139). In fact, the March 31 e-mail

⁸ The judge generally credited Burke’s testimony except for when he change his story related to the investigation into Connelly’s intentional falsification of a medical record. (ALJD 26, 18-30). The change, however, occurred after Burke was discharged for suggesting that a respiratory therapist falsify a medical record. (ALJD 29, lines 33-35). The judge found that portion of Burke’s testimony attributable to possible bias. (ALJD 26, lines 29-31).

⁹ The record evidence reveals that the confrontation focused on the medication occurrence reports and not whether Connelly was denied vacation because of the seniority of another respiratory therapist, Sophie Zeil. To the extent the vacation issue is relevant (which it is not, since the topic(s) she addressed in her verbal assault on Burke played no part in her discipline) the evidence is clear that her vacation was denied because of Respondent’s hospital-wide seniority policy. (RX-28).

indicated that Connelly was still “ranting” about Burke being “trouble” at 7:40 a.m., a full 20 minutes after he reported that she first began to verbally assault him. (GCX-29).

Burke also testified that because of Connelly’s actions, the physicians in the office adjacent to his office had to close their office door. (RX-23; Tr. 1251). Burke’s office is located in a small suite of offices, which includes a speech therapist’s office. (RX-23). According to Burke, the speech therapist regularly sees patients in that office. (Tr. 1250). The small suite of offices also connects to a main corridor of the hospital. (RX-23). This corridor is used by physicians, patients and visitors alike. (Tr. 2164-2165). “In fact, on an inpatient therapy basis, there’s constant traffic in that hallway” (Tr., p. 2166).

After Burke sent the March 31 e-mail to Trigilia and Hyatt, Burke testified that Trigilia did an investigation¹⁰ and spoke to Egolum and the physicians in the adjacent office. (Tr. 1141). After Trigilia spoke to Burke, Egolum and the physicians, he and Burke met with Connelly. (Tr. 1145-1146). During this meeting, Trigilia explained to Connelly that she was probably going to be written up for her actions. (Tr. 1146). Although faced with the real possibility of discipline, Connelly did not deny being loud or insubordinate. (Tr. 1245, 2225). Importantly, during the investigation, Trigilia never referenced Connelly’s outspoken nature. (Tr. 1444). According to Burke, Connelly’s complaining was never an issue since “she is allowed her thoughts” (GCX-29); the only issue was the way she expressed herself in a loud and abusive manner. (Tr. 1246).

¹⁰ Obviously, Trigilia rather than Burke conducted the investigation because Burke himself was involved in the incident.

Trigilia then met with Hyatt about the incident. (Tr. 1780). According to Hyatt, she discussed the incident with Trigilia, including the fact that Burke was a new supervisor and that Connelly, his immediate subordinate, was calling him “trouble” during work time and in a work area. (Tr. 1781-1782). Hyatt also testified that during her discussion with Trigilia, they spoke about how it was perfectly acceptable for Connelly to express her views. (Tr. 1781). Ultimately, the decision to issue Connelly a written warning was made, and Hyatt helped Trigilia draft the warning. (GCX-14). Hyatt harbored no animus toward Connelly, and with respect to workplace complaints, she “was receptive to the concerns of the RT staff” and “made a specific effort to ensure the RT staff concerns were communicated to management.” (ALJD 24, lines 27-30).

III. THE JUDGE ERRED IN FINDING THAT RESPONDENT VIOLATED SECTION 8(a)(1) BY ISSUING CONNELLY A WRITTEN WARNING

A. The Judge Should Not Have Rigidly Applied the *Atlantic Steel* Factors

The problem with the judge’s determination that the Atlantic Steel factors provide the appropriate basis for determining the outcome of this issue, is that such factors were created in order for the Board to establish a class of protected misbehavior that it considered necessary to accommodate the realities of industrial conflict, particularly in the context of bargaining sessions, grievance processing, strikes, and captive audience speeches. NLRB v. Yeshiva University, 444 U.S. 672, 681 (1980) (“The Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry”). In those situations, there exists a need to excuse certain impulsive behavior as an inevitable concomitant of the struggle. Earle Industries, Inc. v. NLRB, 75 F.3d 400, 405 (8th Cir. 1996) (recognizing that in a

bargaining or grievance session, the “Act frees the worker from subordination the employer otherwise has the right to insist on”); Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 731 (5th Cir. 1970) (stating that a certain amount of salty language will be tolerated in bargaining sessions with respect to grievances in recognition of the fact that the sessions are usually held behind closed doors). The Atlantic Steel factors, therefore, are only helpful in distinguishing between gradations of offensiveness of misconduct in a traditional industrial relations setting and do not allow for the consideration of the type of discipline meted out against an employee or the nature of the employer’s workplace.

Due to this inflexibility, the General Counsel has had occasion to argue, and the Board has acknowledged that the Atlantic Steel factors are not always sufficient or useful in every case.

As recently recognized by the Board in Fresenius USA Mfg. Inc., 358 NLRB No. 138 (Sept. 9, 2012), in an opinion issued shortly after the Decision in this case:

The Acting General Counsel suggests that it is not entirely clear whether, or to what extent, some of the *Atlantic Steel* factors are relevant in a case like this one. The employee in *Atlantic Steel* was discharged for calling his foreman a “lying S.O.B.” while discussing a grievance. The employee made that comment on the production floor, within earshot of another employee and without any provocation, in a workplace where such conduct was normally not tolerated. *Atlantic Steel*, supra, 245 NLRB at 816-817. In those circumstances, the Board deferred to an arbitrator’s decision upholding the employee’s discharge, distinguishing earlier cases in which the Board had found employees’ similar references to supervisors, in the heat of grievance discussions away from the production floor, remained protected as part of the res gestae of the employees’ protected activity.

As the Acting General Counsel points out, *Atlantic Steel* does not make clear whether the same four-factor analysis applies only where an

employee has engaged in alleged misconduct toward a supervisor in grievance-related discussions or whether it applies in all cases, like this one, in which an employee engages in other alleged misconduct in the course of protected activity. Although *Atlantic Steel* could be read as applying in all such cases, the Board there distinguished a case in which an employee's use of an obscenity during an organizing campaign was held to be protected. *NLRB v. Cement Transport, Inc.*, 490 F.2d 1024 (6th Cir. 1974). The Board found that situation "very different from the one herein." *Atlantic Steel*, supra, at 816 fn. 12. Moreover, the Board's post-*Atlantic Steel* decisions have not always been consistent. At times, the Board has analyzed cases of this sort under *Atlantic Steel*. See, e.g., *Beverly Health & Rehabilitation Services*, supra, 346 NLRB at 1322-1323. At other times, it has examined the totality of the circumstances without reference to *Atlantic Steel*, although employing some of the *Atlantic Steel* factors. See, e.g., *Honda*, supra, 334 NLRB 746; *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982), enfd. 711 F.2d 1059 (6th Cir. 1983).

In these circumstances, we acknowledge the Acting General Counsel's point that Board precedent does not firmly establish whether cases such as this one should be analyzed under *Atlantic Steel* or under a totality-of-the-circumstances approach.

Id. at fn. 8. See also *NLRB v. Starbucks Corp.*, 679 F.3d 70 (2012) (finding the *Atlantic Steel* factors inapplicable to the facts of that case). This is one of those cases where the judge should have analyzed the facts under a totality-of-the-circumstances approach.

First and foremost, there is no union at Respondent's facility, nor is there a representative election pending or even any evidence of union organizing activity. Therefore, the primary basis for the *Atlantic Steel* decision, i.e. the need for employees and their representatives to come to the bargaining table or grievance resolution proceedings as equals rather than superior and subordinate, is absent here. Connelly was not elected by a majority of her peers to represent their interests, as is the case with a labor organization certified as the bargaining agent for an employee group. While

some of Connelly's concerns may have been shared by others, that did not give her carte blanche to behave as if Burke was her co-worker instead of her supervisor.

Equally important, Respondent's facility is not a steel mill or other industrial facility staffed by largely blue collar workers, and off limits to the public. Unlike private industry, hospitals "carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial setting with which the Board is more familiar." Beth Israel Hospital v. NLRB, 437 U.S. 483, 508 (1978). Principles developed for use in the industrial setting cannot be strictly imposed on a professional environment where even fundamental differences are addressed and resolved through civil discourse. See e.g. Yeshiva Univ., supra, 444 U.S. at 681 ("principles developed for use in the industrial setting cannot be imposed blindly on the academic world"). It cannot seriously be argued that a hospital's legitimate and necessary interests in fostering and maintaining order and mutual respect among staff should not be considered. See e.g. Carleton College v. NLRB, 230 F.3d 1075 (8th Cir. 2000).

Further, the Atlantic Steel factors were announced and have almost always been applied in the context of discharge or involuntary termination of an employee, a penalty often referred to in labor relations as "economic capital punishment." When management employs a gentler reminder that an employee is out of line, especially one like the written warning at issue in this case (which carries no penalty at all), reversal of the disciplinary decision should involve a closer analysis, and require the General Counsel to carry a much heavier burden of proof than in a discharge case. Put another

way, when considering whether an employee's misconduct cost him or her the protection of the Act, it makes no sense to simply pick a point along the scale of offensiveness and say this particular conduct crossed the line, and therefore the employer can impose any penalty it wants, but that particular conduct stopped short of the line, so the employer cannot even counsel the employee that he or she is on thin ice. Each situation must be reviewed in light of its specific facts, the circumstances in which it occurred, as well as the nature of the employer's response.¹¹

Under a totality-of-the-circumstances approach, the record evidence establishes that Respondent did not violate the Act by warning (not terminating or even suspending), Connelly for her verbal assault on her supervisor. First, the evidence is clear that Respondent maintains a workplace where complaints are encouraged and employees, specifically respiratory therapists, are provided ample opportunities to discuss workplace issues. (GCX-2, 9, 15, 18, 19, 20, 22, 23, 24, 25; RX-1, 2; Tr. 214, 253, 280, 849, 851, 866, 1105, 1127-1128, 1216, 1224-1225, 1231-1232, 1262, 1705-1706). Significantly, no respiratory therapist, including Connelly, has ever been disciplined for discussing issues related to his or her terms and conditions of employment, including medical occurrence reports. On the other hand, so far as the record shows, no respiratory therapist, except Connelly, has ever verbally assaulted his or her supervisor.

¹¹ While the judge chose to rely on cases involving a non-union workforce, or a three day suspension, or a hospital (ALJD 19, lines 43-521; 20, lines 1-5) to justify the application of the Atlantic Steel factors to this case, none of those cases involved all of the circumstances present here, and thus their persuasiveness is marginal at best. Similarly, although the Board, utilizing the Atlantic Steel factors, determined that the written warning issued to an employee in Noble Metal Processing, Inc., 346 NLRB 795 (2006) violated the Act, the circumstances of that case are markedly different from this one. In that case, the employer was engaged in the laser welding of metallic materials, and the employee's conduct occurred at a meeting where employees could reasonably expect to express their views, called by Respondent to announce changes in the department where the employee worked. Further, the employee who was issued the written warning was a union steward performing his representative functions.

In addition, the written warning issued to Connelly in no way “chilled” employees in the exercise of their Section 7 rights. In fact, even after the incident, employees continued to make workplace complaints to management without any consequences.

Second, while conducting oneself in an unprofessional and insubordinate manner may enjoy some protection during a bargaining session or as part of a grievance procedure, or even behind closed doors in a scheduled meeting with management, there is simply no excuse for such conduct in a hospital, during work time, and in an area where physicians are present and patients receive treatment, irrespective of whether any patient was actually there at the time. In that regard, the judge’s findings that someone “may” have closed the door of the physician’s office located next to Burke’s office and that the suite of offices where Connelly verbally assaulted Burke was not a patient care area miss the mark. (ALJD 9, line 48; 21, lines 5-6).

The record evidence establishes that Trigilia spoke to the physicians who were in the office next to Burke’s and they confirmed that “the incident was what it was.” (Tr. 1141). Further, Connelly could not unequivocally deny that the physicians were in the office at that time, and stated that “[i]t is a possibility” that the physicians shut their door. (Tr. 664). With respect to the patient care area, the judge determined that the area was not a patient care area simply because there was no evidence that a patient was in the area at the time Connelly verbally assaulted Burke. Immediate patient care areas, however, include “patients’ rooms, operating rooms, and treatment rooms.” See NLRB v. Baptist Hospital, 442 U.S. 773, 780 (1979) (quoting St. John’s Hospital, 222 NLRB 1150 (1976)). The evidence clearly establishes that Burke’s office is located in a small

suite of offices, which includes a speech therapist's office. (RX. 23). According to Burke, the speech therapist regularly sees patients in that office (Tr. 1250), and thus it is a treatment room. In any event, when Connelly verbally assaulted Burke without provocation outside of his office, she clearly was not concerned whether a physician, patient, or anyone else would overhear her abusive rant. All of these factors should have been considered when determining whether Respondent violated the Act.

Third, Burke had only been a supervisor for a few weeks when Connelly verbally assaulted him and labeled him as "TROUBLE." (GCX-29). Such abuse by a subordinate not only violates Respondent's "Inappropriate Behavior" policy (RX-21), but would, contrary to the judge's finding (ALJD 21, lines 20-22), undeniably undermine Burke's authority in the workplace, especially since other subordinates, including Egolum, overheard the statements. That there is no concrete evidence of such undermining at the time Connelly was issued a written warning is irrelevant. See DiamlerChystler Corp., 344 NLRB 1324, 1329 (2005) (the question is only whether the employee's conduct would "reasonably tend"¹² to affect workplace discipline by undermining the authority of the supervisor subject to the vituperative attack).

Lastly, Respondent's responsibility to take corrective action to avoid the creation of a hostile or offensive work environment is not only necessary for it to fulfill its obligations as an employer, but necessary to its patients and their families. Any ruling that would make the finding of a violation depend on whether a patient or other non-employee actually heard or saw the misconduct would be illogical and almost impossible

¹² There is no legitimate reason why the Board should give the term "reasonably tend" in this context any other meaning than it does when analyzing employer conduct that "reasonably tends" to "chill" Section 7 rights.

to apply on a case-by-case basis. The only inquiry should be, did the conduct occur in a place and time where non-employees reasonably could have witnessed it? Even if Connelly's outburst was not in front of any patient, it was clearly not of the kind that would easily be left at Burke's doorway, but rather could provoke further outbursts within the hospital.

Unlike the Atlantic Steel factors, which require certain facts to be mechanically forced into inflexible categories, a totality-of-the-circumstances approach would have allowed the judge to focus on the facts set forth above as a whole. In other words, the judge could have considered, among other things, the nature of Respondent's workplace, the circumstances as they existed at the hospital leading up to Connelly's written warning, the setting in which Connelly's tirade occurred, the severity of the discipline issued to Connelly, and Respondent's justification for that discipline. The judge, therefore, applied the wrong analysis, and the Decision should be reversed.

B. The *Atlantic Steel* Factors do not Support a Finding that Connelly's Verbal Assault of Burke Remained Protected by the Act

Even assuming, for argument sake, that the Atlantic Steel factors are the only considerations applicable in this case, the judge erred in finding that Connelly's misconduct did not cost her the protection of the Act. (ALJD 22, lines 17-22). Under Atlantic Steel, in order to determine whether Connelly's misconduct lost the protection of the Act, the following factors must be examined: (1) the place of the discussion; (2) its subject matter; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way provoked by an employer's unfair labor practices. Despite the judge's finding to the contrary, in this case, only the second factor arguably weighs in favor of

protection, and then only if the Board credits the judge's finding that Connelly was disciplined for complaining about working conditions, rather than for the manner in which she expressed that complaint. However, that factor by itself is not enough to find that Respondent violate the Act. See Texas Instruments Inc. v. NLRB, 637 F.2d 822, 830 (1st Cir. 1981) (“[n]ot all conduct that can, in some general sense, be characterized as an exercise of a right enumerated in section 7 is afforded the protection of the Act.” (citing NLRB v. Local 1229, IBEW, 346 U.S. 464 (1953))).

With respect to the first Atlantic Steel factor, the record evidence establishes that Connelly verbally assaulted Burke while standing outside of his office, during work time, in a work area, within earshot of other employees, and not in connection with any sort of bargaining session or grievance processing. Respondent takes exception to the judge's apparent failure to consider that Connelly attacked her supervisor for 20 minutes during work time and in a work area. Connelly also berated Burke within earshot a physicians' office, causing the physicians inside to close the office door. Importantly, Connelly chose this venue, not Burke; he was minding his own business in his office when she barged in on him. Under such circumstances, the Board has routinely denied employees the protection of the Act. See Verizon Wireless, 349 NLRB 640 (2007) (outburst in an office cubicle adjacent to other employees' cubicles; protection lost); DaimlerChrysler Corp., supra (outburst in the workplace heard by other employees; protection lost); Aluminum Co. of America, 338 NLRB 20 (2002) (outburst in employee breakroom within hearing of other employees; protection lost); Atlantic Steel, supra (outburst on production floor; protection lost).

With respect to the third factor, the record evidence reveals that after the DPH investigation, Respondent spent months trying to explain to the RTs, including Connelly, the importance of medication occurrence reports. Even before reading the March 28 meeting minutes, Connelly had discussed the meeting topics with Charland and was well aware of the requirement that medication occurrence reports should be given to Burke or Trigilia. (Tr. 151). Thus, when Connelly sought Burke out and verbally assaulted him while standing in his office doorway, it was not a spontaneous outburst or reflexive reaction, and accordingly was not protected by the Act. See Media General Operations, Inc. v. NLRB, 560 F.3d 181 (4th Cir. 2009); see also Trus Joist MacMillan, 341 NLRB 369 (2004) (no protection for “offensive outburst [that] was not a spontaneous or reflexive action”). Moreover, when Connelly specifically labeled Burke as “TROUBLE” (GCX-29), she was not expressing the concerns of other RTs, but rather her own personal animosity in an insulting and unwarranted manner. In fact, no other RT who testified at the hearing stated that they thought Burke was “trouble,” or blamed him for the requirement of filing medication occurrence reports. As a result, Connelly’s personal attack need not be tolerated by Respondent. See Care Initiatives, 321 NLRB 144 (1996) (“[I]nsulting, obscene personal attacks by an employee against a supervisor need not be tolerated,” even when they occur during otherwise protected activity”). The nature of Connelly’s outburst is particularly egregious when considering that Burke was trying to explain the situation to her and she would not let him. See In re Carrier Transicold Div. of Carrier Corp., 331 NLRB 126 (2000) (no violation of 8(a)(1) where an employee was disciplined for interrupting a meeting, insisting on discussing

immediately a subject unrelated to the meeting, and refusing to acquiesce to the manager's repeated directions to him that his concerns could be discussed later at a more appropriate time).

Despite the judge's assertion that this factor weighs in favor of protection, the judge apparently failed to even consider most of these circumstances and certainly did not consider them as a whole. The judge did find that the use of the word "trouble" was "genteel compared to other language," and thus remained protected. (ALJD 21, lines 41-42). Aside from the fact that this finding highlights why the Atlantic Steel factors are far too blunt an instrument when applied without regard to the situation in which the misconduct took place,¹³ even when the Board has recognized "some leeway for impulsive behavior" by an employee, it said that that leeway was to be balanced against "an employer's right to maintain order and respect." Piper Realty Co., 313 NLRB 1289, 1290 (1994). Not only was Connelly's verbal assault on Burke not impulsive, but the judge did not even dedicate a footnote to Respondent's right to maintain order, respect and a modicum of civility in the workplace. Maryland Drydock Co. v. NLRB, 183 F.2d 538, 540 (4th Cir. 1950) ("it is not an unfair labor practice to [discipline] an employee for exhibiting a defiant and insulting attitude towards his [supervisor]").

With respect to the fourth factor, Respondent does not take exception to the judge's finding that "General Counsel acknowledges that Connelly's outburst was not provoked by an unfair labor practice or Respondent. Therefore, this factor does not favor protection." (ALJD 22, lines 13-15).

¹³ Indeed, the judge supports that position by drawing comparisons to language used by an employee of a car dealership as opposed to a hospital.

Because only the second Atlantic Steel factor arguably weighs in Connelly's favor, the judge erred in finding that Respondent violated Section 8(a)(1) when it issued Connelly a written warning.

IV. CONCLUSION

Respondent is well aware that the finding of a violation of the Act in connection with Connelly's written warning does not result in the imposition of a financial or other material penalty on the hospital. Therefore, it may seem as if Respondent's cross-exceptions are not of significant consequence. However, decision-makers in Region 34 (now part of Region 1) have publically stated that in their view, when an employee complains about working conditions, so long as at least one other employee shares his or her views, the employee enjoys the protection of the Act, no matter how offensively the message is conveyed. The Board needs to temper such an extreme view.

For all of the foregoing reasons, Respondent respectfully requests the Board reverse the Administrative Law Judge on the issue discussed above.

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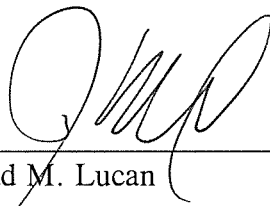
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed with the Board, and was electronically mailed or sent via Federal Express, on December 20, 2012 to the following parties of record:

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